The *Eichmann* Trial

Towards a Jurisprudence of Eyewitness Testimony of Atrocities

Leora Bilsky*

Abstract

For many years, the Eichmann *Judgment has been overshadowed by the Nuremberg proceedings, considered as the more important precedent for international criminal law. In this article, I question this understanding by positioning the* Eichmann *trial at the head of the series of international criminal trials, which have become more familiar over the past two decades. The main part of this article addresses the role of witnesses in light of the framework of 'jurisprudence of atrocity'. It departs from previous literature, which has sharply distinguished the legal from the historical or didactic role of testimony given by victims during the* Eichmann *trial. In contrast, adopting a framework based on collective crimes, this article investigates the changing role of the victim as witness and thereby illuminates such distinctive crimes, which are characterized by mass murder and the separation — both physical and psychological — of the victimizer from his victims. The District Court of Jerusalem in the* Eichmann *case granted witnesses this new role by juxtaposing the dry Nazi documents discussing effective methods and numbers with horrifying stories conveyed by victims and survivors. In this manner, the encounter that could not have taken place during actual events was recreated in the courtroom.*

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1. Introduction

Much has been written on the *Eichmann* trial — by scholars, historians, journalists, intellectuals and the central players during the trial. Some have criticized it as a mere 'political' or 'Jewish' trial, while others argued *Eichmann* played a limited role in advancing international law, in particular, the development of universal jurisdiction and individual liability for international crimes. In this article, I expand on recent scholarship, which has attached a legal significance to *Eichmann* beyond these now familiar concepts, by placing this trial at the beginning of the chain of *contemporary* international criminal trials.

Traditionally, the Nuremberg proceedings have taken prominence over the *Eichmann* Judgment,[1] with the former regarded as the more important precedent for international criminal law. Scholarship on Holocaust trials viewed these two paradigmatic trials as fulfilling two distinct functions. It is considered that the Nuremberg trial, which primarily relied on written documents to convict the defendants, developed international criminal law. In contrast, the *Eichmann* trial, during which testimony given by victims held centre stage, advanced extra-legal goals, such as the formation of a collective memory of the Holocaust.

I submit that this failure by international law scholars to recognize the contribution made by the *Eichmann* trial to international law stems from its misconception as a Jewish trial — arising from, among other things, the *sui generis* category of crimes against the Jewish people, which formed the legal basis of this trial. This perspective has been fostered by Hannah Arendt's influential book, *Eichmann in Jerusalem*, the standard point of reference for this case.[2] This labelling of *Eichmann* as a Jewish trial, in particular, has obscured the way in which these proceedings may contribute to a universal analysis of genocide.[3]

International scholars have only recently rediscovered the *Eichmann* trial and examined its impact on international law.[4] In a groundbreaking article

1 The Trial of the Major War Criminals Before the International Military Tribunal was held from 14 November 1945 to 1 October 1946. The official record of proceedings is available online at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html (visited 28 November 2013) (hereinafter 'IMT Trial').

2 H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, 2006 [originally published, 1963]).

3 See J.N. Shklar, *Legalism* (Harvard University Press, 1964), at 154–155; M.J. Osiel, *Mass Atrocity, Ordinary Evil, and Hannah Arendt* (Yale University Press, 2001), at 61–62. However, in comparison, William Schabas cites the *Eichmann* trial as a case dealing with genocide. See W.A. Schabas, *Genocide in International Law* (Cambridge University Press, 2000), at 286. See also A. Cassese and P. Gaeta, *Cassese's International Criminal Law* (3rd edn., Oxford University Press, 2013), at 114.

4 For the most part, these analyses are confined to the trial's procedural innovations, in particular, the exercise of universal jurisdiction. See G.J. Bass, 'The Adolf Eichmann Case: Universal and National Jurisdiction', in S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press, 2004) 77; L. Bilsky, 'The Eichmann Trial and the Legacy of Jurisdiction', in S. Benhabib, R.T. Tsao and P. Verovšek (eds), *Politics in Dark Times: Encounters with Hannah Arendt* (Cambridge University

published earlier this year, William Schabas maintains that the *Eichmann* judgment set an important precedent for international law and that contemporaneous critics were wrong not to appreciate its legal significance.[5] Schabas details the trial's contribution to the interpretation of genocide and crimes against humanity — as well as the distinction between them — the concept of universal jurisdiction, and its handling of the thorny issues of abduction and retroactivity. Yet, the status of victims in trials concerning atrocities — a central issue in *Eichmann* — is absent from Schabas' analysis, despite the tremendous evolution of this subject since the early 1990s. It seems that, for some scholars, the widespread criticism of the *Eichmann* trial for having provided a stage for the testimony of Holocaust survivors was warranted.[6]

This article examines the *Eichmann* Judgment and its significance for international criminal law. I aim to demonstrate that the District Court of Jerusalem in *Eichmann* developed an innovative jurisprudence — one that grants recognition and importance to testimony given by individual victims during trials of perpetrators of collective crimes. I identify three building blocks in the District Court's transformation of the role of victims in such trials. First, the category of crimes against the Jewish people was interpreted as genocide and crimes against humanity. Second, the Court set out a novel theory of modes of liability specific to collective crimes. Third, the Court defined a new understanding of the social value protected by crimes systematically attacking the humanity of the victim. In conclusion, I argue that the narrative provided by the Court in *Eichmann* Judgment foreshadowed recent developments in the historiography of the Third Reich, which call for an integrated history weaving together perpetrators', bystanders' and victims' perspectives.

2. Responsibility for Collective Crimes — Jurisprudential Innovations in the *Eichmann* Judgment

The legal function served by victims' testimony during the *Eichmann* trial can only become clear once certain jurisprudential innovations within the

Press, 2010) 198; I. Mann, 'The Dual Foundation of Universal Jurisdiction: Towards a Jurisprudence for the "Court of Critique"', 1 *Transnational Legal Theory* (2010) 485.

5 W.A. Schabas, 'The Contribution of the Eichmann Trial to International Law', 26 *Leiden Journal of International Law* (2013) 667.

6 For a recent criticism of the testimony given by victims in *Eichmann* trial see S. Landsman, 'The Eichmann Case and the Invention of the Witness-Driven Atrocity Trial', 51 *Columbia Journal of Transnational Law* (2012) 69. For general criticism of the reliance on the testimony of survivors by international tribunals, in particular, the International Criminal Tribunal for Rwanda (ICTR), see N.A. Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010).

Judgment are acknowledged. This section clarifies the doctrinal structure of collective crimes under which the Court decided to admit more than 100 testimonies of Holocaust survivors.

The main obstacle to the recognition of the *Eichmann* trial's significance for the later jurisprudence on genocide stems from the category of crimes against the Jewish people contained in the indictment — a category unfamiliar in international law.[7] Historian Donald Bloxham argues that the reticence displayed by the Allies at Nuremberg to address race specific crimes committed by the Nazis stemmed from a liberal universalist refusal to single out the treatment of any group as unique, together with the fear that a full exposition of the Shoah would distract attention from the theoretically based conspiracy charge at the centre of the Nuremberg trial.[8] This approach found prevalence among scholars and has arguably led to long held ignorance over the precedential value of the *Eichmann* trial for international law.[9] Moreover, Arendt's and other commentators' criticism of this reliance on crimes against the Jewish people, as set out by Israeli law, instead of crimes against humanity,[10] further prevented international legal scholars from engaging with the *Eichmann* Judgment as an important precedent for international law.

A. A Trial on Genocide and Crimes against Humanity

One starting point for reflection on the value of the *Eichmann* Judgment for a theory of genocide is the recent mapping of international criminal law by Lawrence Douglas. Douglas distils two theoretical frameworks that have competed for dominance in international criminal law. First, the interstate jurisprudence prevalent at Nuremberg — which was centred on aggressive war and intended to protect state sovereignty — and second, supra state jurisprudence — which focused on crimes against humanity and genocide and was designed to pierce the shield of state sovereignty in order to promote individuals' human rights. Douglas maintains that the latter paradigm markedly changed international criminal law and has developed into what he terms 'jurisprudence of atrocity'.[11]

Douglas suggests that this framework, marginalized at the International Military Tribunal (IMT) but central to *Eichmann*, came to prominence during

7 See Items 1-4, Indictment, as read in the District Court of Jerusalem, *Eichmann* Proceedings, 1-3, Vol. I (Session 1); and the discussion *infra*.

8 D. Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford University Press, 2001), at 66.

9 Another reason is that *Eichmann* was decided by a domestic court and not an international tribunal. However, on the interplay between domestic and international, see e.g. N. Roht Arriaza, *The Pinochet Effect* (University of Pennsylvania Press, 2005). See more generally H.H. Koh, *Transnational Litigation in United States Courts* (Foundation Press, 2008).

10 Arendt, *supra* note 2, at 269–272.

11 L. Douglas, 'Crimes of Atrocity, the Problem of Punishment and the Situ of Law', in P. Dojcinovic (ed.), *Propaganda, War Crimes Trials and International Law* (Routledge, 2012) 269.

the 1990s.[12] Building on Douglas' historical mapping of international criminal law, I argue that in comparison to the IMT, the legacy of the *Eichmann* trial is more relevant for contemporary international criminal law. *Eichmann* constituted one of the early defining moments in the development of the jurisprudence of atrocity. In particular, this trial revolved around supra national crimes, such as crimes against humanity and genocide. It is against this background that the legal significance of admitting the testimony of victims can be understood.

The IMT situated the category of crimes against peace at the core of its proceedings. Even where the Tribunal dealt with crimes against humanity, a link to aggressive war was required.[13] In this way, the Tribunal limited its treatment of crimes against humanity to the years after 1939.[14] It was, moreover, primarily geared towards protection of state sovereignty from foreign aggression, not the rights of individual citizens from a criminal state. In contrast, the Israeli Nazis and Nazi Collaborators (Punishment) Law 5710-1950 — the legal basis of the *Eichmann* trial — defined its applicability to acts performed between 1933 and 1945, thereby releasing the District Court from this temporal limitation.[15] Moreover, contrary to the IMT, at the crux of the *Eichmann* trial stood the categories of crimes against the Jewish people and crimes against humanity. The Court was required, therefore, to deal with international criticism, particularly over the legitimacy of the former category. In response, the Court held that far from being an Israeli invention, the category of crimes against the Jewish people represented an accurate translation of the crime of genocide, as defined by the Genocide Convention.[16]

12 In another article, Douglas brings to light elements of this paradigm in the trials held under Control Council Law No. 10. See L. Douglas, 'From IMT to NMT: The Emergence of a Jurisprudence of Atrocity', in K.C. Priemel and A. Stiller (eds), *Reassessing The Nuremberg Military Tribunals* (Berghahn Books, 2012) 276.

13 So-called 'Peacetime genocide' came into being with the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide. See Schabas, *supra* note 5, at 672.

14 See IMT Trial, Vol. 22, 22 August 1946 to 1 October 1946, at 468.

15 Arts 1(a)(1), 1(a)(2), 16, Nazis and Nazi Collaborators (Punishment) Law 5710-1950 (Israel) (hereinafter 'Nazis Punishment Law').

16 'The "crime against the Jewish People" is defined on the pattern of the crime of genocide defined in the "Convention for the prevention and punishment of genocide" which was adopted by the United Nations Assembly on 9 December 1948.' See District Court of Jerusalem, *A.-G. Israel v. Eichmann* (1961), 36 *International Law Reports* 5, reprinted in E. Lauterpacht (ed.), *The Eichmann Judgments* (Butterworths, 1968), at 29–30, § 16 (hereinafter '*Eichmann* Judgment'). Art. II, Convention on the Prevention and Punishment of the Crime of Genocide, defines genocide as 'acts committed with intent to destroy in whole or in part, a national, ethnic, racial or religious group'. Under Art. 1(b), Nazis Punishment Law, crimes against the Jewish people are 'acts committed with intent to destroy the *Jewish people* in whole or in part' (emphasis added). The Israeli law replaced the general term of a racial or ethnic group with the specific term 'Jewish people', but the list of acts that follows is identical in both instruments, with the exception of the destruction of cultural assets and incitement to hatred of Jews, added to the Nazis Punishment Law. The category of crimes against the Jewish people was born several years earlier at Jewish Displaced Persons camps, where several trials against Jewish survivors who had collaborated with the Nazis were conducted. These persons had been accused of committing crimes against the Jewish people and — where found guilty — were declared 'traitors to the

In contrast to the prospective effect of the Genocide Convention, the Israeli law retroactively applied to the genocide committed by the Nazis.[17] The Court justified this retroactive application by distinguishing between two functions of the Genocide Convention. First, the Court clarified that the Convention serves as a declaration of the deep conviction of the international community that the crime of genocide is an international crime. This approval is universal and confirms that the principles laid down by the Convention have attained customary status.[18] The second function, according to the Court, is contractual, namely, the undertaking by the parties to prevent this type of crime in the future and to punish its commission.[19]

In addition to this confirmation of the legitimacy of crimes against the Jewish people through the reference to the Genocide Convention, the Court drew links between this crime and crimes against humanity, which (together with war crimes) were already recognized by the time of Nuremberg as crimes under international law, punishable 'whenever and wherever committed'.[20] The District Court, after an analysis of the position of the IMT and

Jewish people'. L. Jockusch, 'Prosecuting "Crimes against the Jewish People": The Eichmann Trial and the History of a Legal Concept', in Conference on 'The Trial of Adolf Eichmann: Retrospect and Prospect', held at University of Toronto (2012), at 9–10 (conference paper on file with the author).

17 The Court solved this problem by stating that the Nazis Punishment Law had not created a new crime, that is, one not already in existence. The legislation may have been *ex post facto* but it was not retroactive. 'Not one of the crimes defined in the Law in question was, in the words of Blackstone, "an action indifferent in itself" when committed which the "legislature then for the first time declared to have been a crime"'. See *Eichmann* Judgment, at 22–23, § 7.

18 The Court referred to, and cited from, the opinion of the International Court of Justice on reservations to the Genocide Convention. *Reservations to the Convention on the Prevention and Punishment of Genocide*, Advisory Opinion, ICJ Reports (1951) 15. See *Eichmann* Judgment, at 34–35, § 21.

19 The District Court relied on the language adopted by the Genocide Convention. Art. I holds that '[t]he Contracting Parties *confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish' (emphasis added). Art. V states: '[t]he Contracting Parties *undertake to enact*, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III' (emphasis added). The Court emphasized that 'it is of the nature of conventional obligations, as distinct from the confirmation of existing principles, that unless another intention is implicit, their application is *ex nunc* and not *ex tunc*'. *Eichmann* Judgment, at 36, § 22. Schabas draws attention to the double bind that trapped the District Court. Should the Court have relied on the Israeli law, it had jurisdiction but not the legitimacy of the international community. If, on the other hand, the Court showed that the law was based on the international recognition of genocide, it did not have jurisdiction, because the Genocide Convention limited it to 'a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'. The solution adopted by the Court was that the Israeli Nazis Punishment Law relied only on the declarative function of the Genocide Convention, and therefore, the Court was not limited by the jurisdictional restriction laid down in Art. VI, Genocide Convention. See Schabas, *supra* note 5, at 689.

20 *Eichmann* Judgment, at 40, § 26.

Control Council Law No. 10 in relation to the international status of these crimes, reasoned that: 'The "crime against the Jewish People", which constitutes the crime of "genocide", is nothing but the gravest type of "crime against humanity"' and 'therefore, all that has been said in the Nuremberg principles on the "crime against humanity" applies a fortiori to the "crime against the Jewish People"'.[21] The Israeli Supreme Court, serving as the appellate jurisdiction in *Eichmann*, held that while crimes against the Jewish people differed from crimes against humanity by requiring intent as *mens rea*, this category should nevertheless be viewed as a type of crime against humanity. In this way, for the Supreme Court, crimes against humanity provided the overall framework of the trial. The Court thus rendered crimes against the Jewish people as a specific category subsumed under the general heading of crimes against humanity.[22]

Moving beyond this dispute over the particularism of crimes against the Jewish people, it can be seen that at the heart of the *Eichmann* trial stood those newly defined crimes — crimes against humanity and genocide — epitomized by the crimes committed by the Nazis. Similar to contemporary international criminal trials, the *Eichmann* trial's main concern was the individuals persecuted as part of a group by the regime and not the protection of state sovereignty against aggression by other states.

B. An Original Theory of Bureaucratic Responsibility for Collective Crimes

As mentioned earlier, the District Court in *Eichmann* grappled with a unique category of criminality — that is, systematic, collective crimes.[23] Such crimes are large scale, requiring a high degree of organization, carried out as part of an officially sanctioned policy, based on mobilization of many participants,

21 *Ibid.*, at 41, § 26.

22 Supreme Court of Israel, *Eichmann v. A.-G of the Government of Israel* (Criminal Appeal 336/61), 29 May 1962, reprinted in Lauterpacht, *supra* note 16, at 288, § 10. See also Simon Agranat's biography by P. Lahav, *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (University of California Press, 1997). See also Schabas, *supra* note 3, at 9–10, 11.

23 I am using the terms 'collective crimes' and 'bureaucratic crimes' interchangeably in this article, since both were related in Nazi criminality. See Z. Bauman, *Modernity and the Holocaust* (Polity Press, 1989). However, there is a distinction between the collective and bureaucratic nature of these crimes, which may raise different legal concerns. For example, while collective crimes involve many individuals, they can still operate on a personal level. The bureaucratic setting, however, adds an aspect of estrangement of the perpetrator from the victim, the results of his deeds, and a division of labour that can significantly influence *mens rea*. Further analysis of this distinction falls outside the scope of this article. I am grateful to Galia Schneebaum for highlighting this point. For an elaboration of the importance of this distinction for the contemporary work of the ICTY see H. van der Wilt, 'Joint Criminal Enterprise and Functional Perpetration', in A. Nollkaemper and H. van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press, 2009) 158, at 166–170. The author argues that while JCE could be adequate for collective crimes involving gang or mob violence, it does not fit system criminality in which the bureaucratic apparatus plays a crucial role in distancing and dissociating the perpetrator from his victims.

and affect large numbers of victims.[24] Systematic, collective crimes pose a major legal problem. Domestic criminal law is premised on individual responsibility. Where criminal law applies to a group of criminals, the ordinary division of responsibility differentiates between the physical perpetrator and the individual who enticed, aided or assisted this perpetrator. The former is considered a principal while the latter is a mere accomplice. A closer examination of the *Eichmann* Judgment reveals the Court's dissatisfaction with the legal outcome of this traditional division of responsibility between principal and accessory in Israeli criminal law. Instead, the Court formulated an original theory of responsibility for participation in these collective crimes, akin to the modern doctrine of Joint Criminal Enterprise (JCE). This doctrine extended the mode of participation in a crime through its conceptualization as part of a larger enterprise. However, those tribunals developing JCE in the 1990s — the international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) — and the international law scholars discussing this doctrine, neglected to reference the *Eichmann* Judgment.[25]

This doctrine was first developed in the trials held under Control Council Law No. 10, after the Nuremberg proceedings.[26] In these cases, the notion of a common plan was used alongside the doctrines of criminal conspiracy and membership in a criminal organization, recognized at Nuremberg, as legal devices to overcome the disjunction between the so-called 'planning mind' and the 'executing hand' in collective crimes. However, to reach perpetrators higher in the ranks of bureaucracy, the IMT and the trials under Control Council Law No. 10 relied mainly on the doctrine of criminal conspiracy. The Israeli District Court could have similarly made recourse to this doctrine given that it had been incorporated into Israeli domestic law from Anglo-American law.[27] Alternatively, the Court could have relied on precedents from

24 Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives*, UN Doc. HR/PUB/06/4 (2006), at 11–12.

25 One of the most recent cases citing the *Eichmann* Judgment does not strictly do so in relation to JCE, but instead, the term 'accomplice' in complicity in genocide. See Judgment, *Brđanin* (IT-99-36-T), Trial Chamber, 1 September 2004, § 725. In legal scholarship, Michael Scharf provides one of the only articles mentioning the application of a JCE type doctrine in the *Eichmann* Judgment. See M.P. Scharf, 'Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change', 43 *Cornell International Law Journal* (2010) 439, at 464–465. See discussion in *infra* note 30.

26 The final sentence in Art. 6, Charter of the International Military Tribunal, reads: 'Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.' Art. II(2), Control Council Law No. 10, holds: 'Any person … is deemed to have committed a crime … if he (d) was connected with plans or enterprises involving its commission.' For elaboration on the interpretation of a criminal enterprise by the Nuremberg Military Tribunals see K. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011), at Chapter 12.

27 The Israeli legal system inherited the doctrine of joint criminal liability of co-conspirators from the British Mandate and, at the time of the *Eichmann* trial, it was recognized by Israeli courts, see e.g. *Kaiser v. A.-G. of the Government of Israel*, C.A. 88/58, Piskei Din 12, 1628. It was widely

international law set by the Nuremberg trial, as had been suggested by the Israeli prosecution in *Eichmann*.[28] The Court in excluding this solution held:

> We do not consider that a person who consents to perpetrating a criminal act or acts (for this is the essence of the conspiracy), renders himself *ipso facto* liable, without any additional ground of responsibility, as actual perpetrator of all those acts. …Were we to accept the Attorney General's argument, we would destroy the statutory framework of Sections 23-25 of the Criminal Code Ordinance, which defines the responsibility of the various parties to a crime.[29]

The Court rejected the conspiracy doctrine as overreaching and held it constituted a threat to individual freedom by undermining the distinction between principal and accessory. This stand is commendable. Despite the need for a doctrine to overcome the difficulties of attributing responsibility in an offence involving multiple perpetrators, the Court chose to reject conspiracy and adopt a higher threshold of proof for establishing Eichmann's guilt. This decision also led the Court to search for an alternative way to bridge the gap between the collective crimes and individual responsibility. Thus, similar to the jurisprudence of the ICTY and ICTR, the recourse by the District Court to JCE type of liability was an alternative to the more collectivist and overreaching conspiracy doctrine.[30]

To overcome such problematic aspects in establishing Eichmann's responsibility, the Court proceeded in two stages. First, it distinguished between the responsibility of an accomplice in a standard criminal trial and the responsibility of those who would, at first glance, appear to be accomplices in the Final Solution but are, in fact, principally responsible for such crimes. Second, the Court advanced a type of JCE responsibility, differentiating between different kinds of direct perpetrators in a common plan.

1. Accomplice Liability

At the time of the *Eichmann* trial, Israeli law distinguished between the liability of a principal perpetrator and an indirect perpetrator (an aider and abettor).[31]

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used, despite sharp criticism by criminal law scholars. See e.g. S.Z. Feler, 'Achrayut Plilit Belo Ma'ase, Al Smach Ma?' [Criminal Liability Without an Act, Based on What?], 29 *Haperaklit* (1975) 19.

28 'The Attorney General argued that the plan for the "Final Solution" must be regarded as a criminal conspiracy. …The Accused participated in this criminal conspiracy and therefore must *ipso facto* be held liable for all the offences committed to accomplish the conspiracy, whether or not a particular act … was committed with his active participation.' *Eichmann* Judgment, at 230, § 187.

29 *Ibid.*, at 231–232, § 188.

30 Scharf considers that the *Eichmann* trial applied a type of JCE. See Scharf, *supra* note 25, at 461.

31 According to Art. 23(1), Criminal Law Ordinance (1936): 'When an offence is committed each of the following persons is deemed to have taken part in committing the offence … (a) every person who actually does the acts, or makes the omission or any of the omissions which constitute the offence; (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence; (c) every person who, whether or not he is present at the

The District Court explained that complicity law alone cannot capture the essence of Eichmann's responsibility as a senior in the apparatus, since it presupposed a hierarchy between a principal and an accomplice — aider and abettor or solicitor — which would have rendered Eichmann a mere accomplice.[32] This result would have been incompatible with the District Court's understanding of the role of the aider in the commission of collective crimes as more central than the actual perpetration.[33] Thus, after having analysed Eichmann's responsibility with the aid of Israeli legislation that defined modes of participation, the Court concluded:

> [W]ith such a vast and complicated crime as the one we are now considering, in which many people participated, at different levels of control and by different modes of activity — the planners, the organizers and the executants, according to their rank — there is little point in using the ordinary concepts of counseling and procuring the commission of an offence … the extent to which any one of the many criminals were close to or remote from the person who actually killed the victim says nothing as to the measure of his responsibility. *On the contrary, the degree of responsibility generally increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher levels of command*, the 'counselors', in the language of our law.[34]

There was no difference, at this time, between an accomplice and a principal perpetrator in sentencing. Therefore, the Court could have handed down a judgment that reflected Eichmann's higher degree of responsibility by adjusting the sentence to reflect the nature of this new crime. In other words, the Court could have bent the law to fit the exceptional nature of this case.[35] Unconvinced by such reasoning, however, the Court formulated another solution that dealt directly with collective crimes.

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time of the offence is committed, aids another person in committing the offence … ; (d) every person who, whether or not he is present at the time the offence is committed, counsels or procures any other person to commit the offence.' Although the law distinguished between the responsibility of principal and accomplice, there was no such distinction made in punishment. This was altered in 1994 in Israel by the Amendment 39 to the Penal Law.

32 *Eichmann* Judgment, at 236–237, § 197. The Court referred to Art. 24, Criminal Law Ordinance (1936): 'When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose any offence or offences is or are committed of such a nature that the commission is a probable consequence of the prosecution of such purpose, each of such persons being present at the commission of any of such offences is deemed to have committed the offence or offences committed'. *Ibid.*, at 231–232, § 188.

33 L. Bilsky, *Transformative Justice: Israeli Identity on Trial* (University of Michigan Press, 2004), at 127.

34 *Eichmann* Judgment, at 236–237, § 197 (emphasis added).

35 Perpetration by means was not yet incorporated into Israeli law at that time. It was only included in 1994. See Section 29(c), Penal Law 5737–1977. For criticism of the narrow formulation taken by Israeli legislation on perpetration by means, see M. Kremnitzer, 'HaMevatzea BeDinei Onshin — Kavim Lidmuto' [The Characteristics of the Perpetrator in Criminal Law], 1 *Plilim* (1990) 65; M. Gur-Arye, 'Hatsa'at Hok Ha'Onshin' [The Penal Law's Bill], 24 *Mishpatim* (1994) 9. In comparison, Art. 25(3), ICCSt., does not require that the 'other' is innocent.

2. Responsibility Akin to Joint Criminal Enterprise

Given these complications in viewing Eichmann as a mere accomplice, the Court offered an alternative mode of participation under which Eichmann would be considered a principal. The Court advanced a new doctrine of modes of participation, which was limited to collective crimes, such as the Final Solution. Thus, instead of developing a general theory of participation applying to all types of crimes, the Court constructed the form of participation from the nature of the crime itself.

The Court determined that the crime against the Jewish people, that is, genocide, was by its nature a collective crime: both from the perspective of criminal intent, which was not directed at a specific victim but towards a whole group; and from the perspective of the criminal act, which was dependent on an apparatus, coordinating the actions of a vast number of persons in different places as part of the same extermination mechanism.[36] The Court held:

> When the order was given to exterminate the Jews, it was evident that this was a most complicated operation. … It was therefore clear from the outset that a complicated establishment was necessary to carry out the task. Whoever was let into the secret of the extermination plan, above a certain rank, knew that such an establishment was required, that it existed and functioned, although not everyone knew how each part of the establishment operated, with what means, at what pace or even where. Hence, the extermination campaign was one single comprehensive act, not to be split up into acts or operations performed by sundry people at sundry times and in sundry places. One team of men carried it out in concert the whole time and everywhere.[37]

The Court derived Eichmann's participation as a principal from the collective nature of the crime:

> [W]hoever collaborated in the extermination of Jews, with knowledge of the plan for the 'Final Solution' and for its furtherance, is to be regarded as an accomplice in the extermination of the millions who were destroyed during the years 1941-1945, irrespective of whether his actions extended over the entire extermination front or only over one or more sectors of it. His responsibility is that of a 'principal offender' who has committed the entire crime in conjunction with the others.[38]

36 *Eichmann* Judgment, at 242, §§ 190–194.

37 *Ibid.*, at 234, § 193.

38 *Ibid.*, at 234, § 194. To avoid confusion, it should be noted that in the Hebrew original the legal meaning of the term 'accomplice' was not used in terms of modes of participation but, more generally, to refer to a partner, who could be a principal offender as well. In relation to this assertion, Schabas argues that the concept of co-perpetration as formulated by the Pre-Trial Chamber of the International Criminal Court (ICC) does not substantially differ from the vision of the District Court. See Decision on the Confirmation of Charges, *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, § 326. W.A. Schabas, *An Introduction to the International Criminal Court* (4th edn., Cambridge University Press, 2011), at 227.

Accordingly, the Court found Eichmann criminally liable for the Final Solution. As summarized by Scharf:

> [T]he District Court found that Eichmann was made aware of the criminal plan to exterminate the Jews in June of 1941; he actively furthered this plan via his central role as Referent for Jewish Affairs in the Office for Reich Security as early as August of 1941; and he possessed the requisite intent (specific intent here, because the goal was genocide) to further the plan as evidenced by 'the very breadth of the scope of his activities' undertaken to achieve the biological extermination of the Jewish people. On the basis of these findings, Eichmann was held criminally liable for the 'general crime' of the Final Solution, which encompassed acts constituting the crime 'in which he took an active part in his own sector and the acts committed by his accomplices to the crime in other sectors on the same front'. In so holding, the District Court ruled that full awareness of the scope of the plan's operations was not necessary, noting that many of the principal perpetrators, including the defendant, may have possessed only compartmentalized knowledge.[39]

Evidently, this responsibility was different from that of principals and accomplices in ordinary crimes, since it did not require the same amount of cooperation and a common mental element. It was also different from the liability of co-conspirators: it was not sufficient to be complicit in the planning stage, instead participation in the criminal act was required. Indeed, throughout the Judgment the Court emphasized Eichmann's centrality to the Final Solution and rejected his claim of being a simple clerk, mechanically executing the orders he was given.[40]

The concerns that drove the Court in *Eichmann* to devise a doctrine for the division of responsibility — in particular, dissatisfaction with complicity law — are present in the application of JCE by contemporary international criminal tribunals.[41] The solution reached by both was similar. It is based on understanding the collective nature of the crime and taking into account the

39 See Scharf, *supra* note 25, at 464-465.

40 The District Court described Eichmann's role in the Nazi regime as central from the start. Thus, in the early stages of persecution, the Court described him as 'the emigration expert'. See *Eichmann* Judgment, at 92, § 65. The Court later underscored Eichmann's essential role in the deportations to Poland and the functioning of the immigration centres. See *ibid.*, at 95, 98, §§ 71, 74. According to the Court, the so-called 'Nisco Plan' to evacuate and settle deported Jews in the Government-General was Eichmann's idea and he personally supervised its implementation and there was evidence that he may have been there personally and made a speech in front of the deportees. See *ibid.*, at 95, § 72. The Court concluded this episode: 'The responsibility for the whole operation, including all the human suffering which it entailed, falls directly upon the accused.' See *ibid.*, at 96, § 72. Moreover, in the advanced stages of persecution, when describing the Wannsee Conference in 1942, the Court cited Reinhard Heydrich as confirming Eichmann's position as the 'authorized *Referent* of the RSHA in matters connected with the "Final Solution" of the Jewish problem'. See *ibid.*, at 112, § 88.

41 Similar to the Court in *Eichmann*, the ICC is not satisfied with complicity law. Alexander Zahar and Göran Sluiter explain: 'JCE doctrine could generate a much higher level of responsibility … than the … straightforward commission of the crimes and of aiding and abetting others to commit them. JCE … creates a class of equally responsible co-perpetrators of an expanded set of crimes, a set which moreover consists not only of the co-perpetrators' intended crimes, but also of crimes foreseen by them.' A. Zahar and G. Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press, 2008), at 222.

organization or collectivity as something without which the crime cannot be effectuated.[42]

3. Victims' Testimony and the Determination of Guilt

This analysis in the *Eichmann* Judgment of the collective nature of genocide, combined with the novel theory of modes of liability, transformed the role of testimony given by victims during the *Eichmann* trial. These testimonies were granted a juridical rationale going beyond the didactic goals of clarifying history and constructing collective memory. In her analysis of the *Eichmann* trial, Arendt portrayed the prosecutor, Gideon Hausner, and the Presiding Judge, Moshe Landau, as antagonists who pulled the trial in separate directions: the theatrical (political), on the one hand, and the legal, on the other. Arendt sided with Landau's approach.[43] The Court, Douglas explains, was a restraining force, opposing the didactic goal of the prosecution and its expansive definition of victims' testimony, in order to steer these testimonies towards a legal use.[44] However, as the biography of Landau reveals,[45] this dichotomy is misleading. Despite Landau's criticism of Hausner's pathos and theatricality and although Eichmann's guilt could have been proven from the prosecution's documents alone — much as has been done at Nuremberg — Landau agreed with Hausner on a principal matter: the need to open the door to the testimony of over 100 Holocaust survivors.

It is clear why Hausner, committed to a didactic understanding of the trial, had chosen to expand the stage and permit victims' testimony,[46] and why

42 Since *Eichmann* was the sole case at that time in which an Israeli court dealt directly with the commission of crimes of the Final Solution by a Nazi perpetrator, this Court only cursorily sketched the liability of the distant perpetrator, for example, the centrality of his contribution and the mental element required for genocide. There were several prosecutions in Israel in the 1950s and 1960s based on the Nazis Punishment Law. However, these cases were directed against Jewish survivors who had been collaborators and included indictments not based on the provision relating to crimes against the Jewish people. See O. Ben-Naftali and Y. Tuval, 'Punishing International Crimes Committed by the Persecuted', 4 *Journal of International Criminal Justice* (2006) 128, at 153. In contrast, the JCE jurisprudence of the ICTY and ICTR has evolved during the years to clarify issues including the scale of such a joint criminal enterprise, the type of contribution required of a distant perpetrator, the mental state regarding the common objective. For instance, an evolution in the ICTY's interpretation of liability under JCE can be detected. This has led to a requirement that the contribution of the accused be significant to the commission of the crimes (though it need not be essential or substantial). See e.g. Judgment, *Brđanin* (IT-99-36-A), Appeals Chamber, 3 April 2007, § 430; Declaration of Judge van den Wyngaert, *ibid.* See van der Wilt, *supra* note 23, at 172–174.

43 Arendt, *supra* note 2, at 4–5.

44 L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press, 2001), at 153–154.

45 M. Shaked, *Moshe Landau: Judge* (Books in the Attic, 2012) [Hebrew].

46 In his memoir, Hausner writes: 'In order merely to secure a conviction, it was obviously enough to let the archives speak; a fraction of them would have sufficed to get Eichmann sentenced ten times over. But I knew we needed more than a conviction; we needed a living record of a

Arendt deeply objected to this move, warning against the danger of a show trial. Yet, this merely serves to accentuate the riddle over Landau. Why did Landau, who had explicitly adhered to a formalist jurisprudential stance and limited the goals of the criminal trial to ascertaining the guilt of the defendant,[47] agree to open the door to the testimonies of so many Holocaust survivors, the majority of whom were not strictly eyewitnesses? For Michal Shaked the answer must be to simply accept this internal contradiction in Landau's stance.[48]

Nonetheless, neither this explanation nor the conventional view that testimony given by victims fulfilled a didactic purpose, satisfactorily accounts for the Court's use of victims' testimony alongside German documents to ascertain Eichmann's guilt.

I argue that the Court's novel interpretation of the crimes involved in the Final Solution as collective crimes, together with its articulation of a JCE type of responsibility, rendered the testimony of victims an integral part of the legal investigation into Eichmann's guilt in such a new collective crime, namely, the Final Solution.

Three principal functions of the testimony of victims can be identified throughout the *Eichmann* Judgment. The first, contained in paragraphs 62–65 of the Judgment, involved testimony by eyewitnesses relating directly to Eichmann, by those who met or saw him. This is the most conventional and familiar use of eyewitness testimony in a criminal trial. There were several types of witnesses: classic eyewitnesses, mainly individuals who had been active in the Jewish communities and came to know and 'work' with Eichmann before the war, when he served in the Sicherheitsdienst in Berlin and later when he was in charge of the immigration of Jews from Austria;[49] witnesses who negotiated with Eichmann in Hungary over the so-called 'Blood for goods, goods for blood' deal, that is, the Kasztner affair;[50] and finally, those who had placed Eichmann in ghettos and camps through their

gigantic human and national disaster, though it could never be more than a feeble echo of the real events. I decided, after I had had the opportunity to go deeper into the matter, to call many more than the thirty-odd witnesses proposed by Bureau 06 as a mere supplement to the documents. I decided that the case would rest on two main pillars instead of one: both documents and oral evidence.' G. Hausner, *Justice in Jerusalem* (1st edn., Harper & Row, 1966), at 291.

47 According to Landau: 'The purpose of every criminal trial is to investigate the truth of the prosecutor's charges against the accused who is on trial, and, if the accused is convicted, to mete out due punishment to him. Whatever requires clarification to achieve these ends must be examined at the trial, and whatever is foreign to it must be excluded from the proceedings.' *Eichmann* Judgment, at 19, § 2.

48 Shaked, *supra* note 45, at 210.

49 Examples include Beno Cohn (*Eichmann* Proceedings, 188, 195, Vol. I (Session 15)), his testimony was mentioned in §§ 62, 65, *Eichmann* Judgment; Aharon (Walter) Lindenstrauss (*Eichmann* Proceedings, 200, Vol. I (Session 15)), his testimony was cited in § 63, *Eichmann* Judgment), Moritz Fleischmann (*Eichmann* Proceedings, 222, Vol. I (Session 17)), his testimony was cited in § 64, *Eichmann* judgment.

50 For elaboration see Bilsky, *supra* note 33, at 90–93.

testimony.[51] Secondly, there was testimony on the historical context of the crime, including paragraphs 56, 57, 64, 66 and 109 of the Judgment.[52] Thirdly, the Judgment contains testimony referred to alongside documents to highlight aspects of the Final Solution that could not have been ascertained from Nazi documents alone, for example, paragraphs 100, 122–127, 130 and 136.

The first two categories have received extensive attention in the literature, on the basis of the legal versus didactic dichotomy. However, the third category of testimony given by survivors of the Final Solution to establish Eichmann's guilt has escaped notice and will be the focus of my examination.

In his criticism of the IMT trial at Nuremberg, historian Donald Bloxham writes: 'Crimes that were not documented, or of which no documentation survived were not likely to emerge at Nuremberg.'[53] The Nazi crimes were unique by relying on a bureaucratic apparatus and division of labour that created an almost hermetic separation between the 'planning head' — the desk murderer, such as Eichmann — and the 'performing hand' — the executive ranks which shot, gassed, and killed. Exclusive reliance on the documents of the Nazi regime intensified this gap, within which the victims were no more than faceless, story-less statistics.[54] The Court in *Eichmann* bridged this gap by interweaving the perpetrators' documents with victims' testimony and thereby created an integrated narrative of these crimes during the Final Solution. In doing so, it offered a novel understanding of this facet of collective crimes, which separates and distances between victimizer and victim. Critically, this approach was not taken for extra legal or didactic purposes solely, but in

51 Examples include Adolf Engelstein, who testified that he was taken out of Theresienstadt to perform certain construction works and was given instructions by Eichmann (*Eichmann* Proceedings, 666, Vol. II (Session 45)), his testimony was included the judgment but not in relation this point; Witaslaw Diamant, who was in Theresienstadt and testified that a committee of SS officers, Eichmann among them, was engaged in a selection process to Auschwitz (*Eichmann* Proceedings, 662–663, Vol. II (Session 45)). His testimony was referred to in § 152, *Eichmann* Judgment, to show that Eichmann was deeply involved in the management of the Theresienstadt ghetto and also took part in the selection process. The testimony of Yaakov Friedman (*Eichmann* Proceedings, 971–973, Vol. II (Session 64)), who saw Eichmann in Majdanek, was not included in the Judgment.

52 E.g. the description of the persecution of Jews in Germany during the first stage was described inter alia through the testimony given by Benno Cohn and Zyndel Grynszpan. The purpose of referring to these testimonies was to demonstrate how these actions intended 'to deprive the Jews of citizen rights, to degrade them and to strike fear into their hearts, to separate them from the rest of the inhabitants, to oust them from the economic and cultural life of the State, and to close to them the sources of livelihood'. See *Eichmann* Judgment, at 82, § 56.

53 Bloxham, *supra* note 8, at 63.

54 One of the prosecutors in the *Eichmann* trial, Gabriel Bach, later explained that the prosecution encountered difficulties proving the number of murdered Jews in the Holocaust, as a document from Auschwitz indicating the number of inmates could have been easily challenged. To solve the problem, Bach suggested that the prosecution call survivors to the witness stand and compare the numbers tattooed on their arms with the numbers in the document in order to prove the document was reliable. Y. Roseman, *Gabriel Bach: Attorney, Judge and Gentleman* (Miskal, 2011) [Hebrew], at 84–85. Here, a reversal can be seen: because the testimony of survivors who were not classic eyewitnesses could not have been relied on to prove guilt, the prosecution sought to rely on the numbers tattooed on their arms as objective proof.

order to adapt the law itself to the nature of collective crimes. Thus, in the Judgment, the testimony given by victims was put to various legal uses, including proving *mens rea* and the systematic pattern of the crimes. Moreover, the relevance of victims' testimony was not merely procedural (the result of expanding the direct responsibility of Eichmann through a theory of modes of liability), but reflected an understanding of the social value protected by genocide and crimes against humanity.

A. The Judgment's use of Testimony given by Victims

To determine Eichmann's involvement in the first two stages of the persecution of the Jews, from 1933 to September 1939 and September 1939 to mid-1941, the Court relied on testimonies and documents. However, testimony was cited briefly and in passing. At times, the Court corroborated certain testimony with a document and vice-versa. However, in the sections on the Final Solution, and in particular, the discussion of events in eastern Europe, the Court provided more space for testimony and noted, at the beginning of the section, that '[h]ere and there in our Judgment, we have interspersed verbatim passages from the evidence.'[55] A few examples serve to illustrate this point.

First, Eichmann presented himself as an expert on transportation and testified at length on conditions during transport. Contradicting his defence of ignorance over the conditions during these transports, the Court juxtaposed a document with witness testimony:

> From the minutes of a meeting (T/1162) which took place in Munkacz between representatives of the Hungarian gendarmerie and the German Gestapo, we learn about transportation conditions. A Hungarian officer remarks: 'If necessary, even 100 people can be put into a single carriage. They can be packed like salt herrings, for the Germans need strong people. Those who cannot hold out will fall. Fashionable ladies are not needed there in Germany'.[56]

The Court continued: 'Thus, Veesenmeyer reports on May 25, 1944 on "the increased exploitation of the railway cars" (*staerkere Belegung der Waggons*), enabling a much quicker completion of the evacuation programme from Carpatho-Russia (T/1193).'[57] The Court subsequently incorporated, by referral, the testimony of a Jewish victim: 'Mr. Ze'ev Sapir gave evidence about the deportation of Jews from Munkacz. The whole community of 103 persons, were loaded into one freight car without food and without water for the whole three-day journey to Auschwitz (Session 53, Vol. III, pp. 971-972).'[58]

This juxtaposition broke through the jargon contained in the document, by conveying the Jewish victims' experience and revealing that one freight car meant the elimination of an entire community. This testimony established the

55 *Eichmann* Judgment, at 150, § 119.
56 *Ibid.*, at 139, § 112.
57 *Ibid.*, at 139, § 112.
58 *Ibid.*, at 139, § 112.

inhuman transportation conditions, namely, lack of food and water for three days. To conclude, the Court quoted the testimony given by Hansi Brand. Brand stated that when she and Dr. Kasztner approached Eichmann 'with the news that 100 people had been loaded into one car, this is how he reacted: "He told us we were not to worry, because this only concerned Jews from Carpatho-Russia, whose families were blessed with many children. These children therefore did not need so much air and so much room, and nothing would happen to them"'.[59]

This illustrates the method employed by the Court to tie together documents, testimony, and eyewitness accounts not only to determine Eichmann's link to the crime committed against those transported, but also his mental state during its commission. It also brought to light the way in which the humanity of the victims was undermined by this crime.

Second, in relation to murder using gas, the Court first cited Eichmann's statement: 'Perhaps it was that in Eastern Ministry circles they said to themselves: "This must be done in a more elegant manner"'.[60] This presented the perpetrator's position and immediately thereafter the Court quoted testimony at length given by a survivor of the Chelmno extermination camp, where this method was used regularly and extensively. Michael Podhlebnik, taken to Chelmno at the end of 1941, was locked in a cellar and recalled what he heard outside:

> A truck was waiting for them on the other side … The people saw the truck, and did not want to get on, but S.S. men with batons in their hands stood around, they beat them, they hustled them and forced them to get on to the truck … These vans were of the kind in which the people were locked and then gas was let in … We heard screams from inside the vans, and when the engine was started, the gas was released. Slowly the screams died down until they could no longer be heard outside.[61]

This contrast between the human experience of the victims and Eichmann's reference to death by gassing as an elegant solution conveyed the nature of such new collective crimes, which allowed for isolation of the perpetrator responsible for planning from the reality of the victims. Later, the witness was taken to a forest in which he and other Jews were forced to dig pits for the trucks that arrived from that same building. He stated: 'I was working there a few days until … all the people I knew in town were brought. My wife and two children were there … I lay down near the bodies of my wife and two children and wanted them to shoot me. An S.S. man came up to me and said: "You are still strong, you can go on working". He hit me twice and pushed me on to work again.'[62]

In the Judgment, this transition from hearing to seeing, from distance to proximity, intensified the horrifying moment of recognition, when the witness saw the bodies of his wife and children and wished to join them. The Court

59 *Ibid.*, at 139, § 112.
60 *Ibid.*, at 154, § 122.
61 *Ibid.*, at 154, § 122.
62 *Ibid.*, at 155, § 122.

then expanded on this by clarifying that Jews from the vicinity, especially from Lodz ghetto — where Jews from other countries had been assembled — were brought to Chelmno and, according to Nazi documents, the defendant and his department had the responsibility to arrange the transportation of Jews from the Reich to Lodz. The Court concluded with the total number of Jews exterminated in Chelmno, as set out in an official Polish report.[63]

In an ordinary criminal trial, Eichmann — responsible for having transported Jews to the Lodz ghetto — would not have been accountable for the murder of these Jews in Chelmno. According to the Court's JCE type doctrine, however, once it was proven that transportation to ghettos and the killings in gas chambers were part of a systematic plan, namely, the Final Solution, in which Eichmann held an active and central role, Eichmann was also liable for these murders.[64] The link between the doctrine of criminal liability and the testimony of Podhlebnik and other witnesses can be seen here. This juxtaposition of the perpetrator's and victim's views — that could not have occurred at the time of the events due to the complex bureaucratic apparatus separating them — created an integrated history of the Holocaust. It was masterfully employed by the Court for a legal purpose: to shed light on these new crimes, characterized not only by mass murders, but also the separation of the perpetrator from his victims.

In this context, it is interesting to note two further aspects of the bureaucratic apparatus made apparent by Podhlebnik's testimony and its juxtaposition with Nazi documents. First, as detailed above, the individual who issued the order and the individual who acted in pursuance of it were geographically separate. Second, the victims were forced to dig the graves and thus reluctantly became part of the overarching apparatus.

Once the concept of guilt was expanded to encompass the overall plan for the Final Solution, 'irrespective of whether [the defendant's] actions extended over the entire extermination front or only over one or more sectors of it',[65] Podhlebnik's testimony became relevant to proving Eichmann's guilt. From a formalist perspective, the Nazi perpetrators' documents may have been sufficient to connect Eichmann to these crimes. However, exclusive reliance on documents would have allowed the defendant to continue to maintain his distance from the victims. The construction of these crimes was such that the 'planning head' would not have faced the moral results of his actions. The architecture of an ordinary criminal trial, which does not necessarily integrate the perspective of victims, creates, in a sense, a similar effect, thus making the court itself participate in the same problematic aestheticization of murder. By bringing the testimony of victims into its Judgment, the District Court in *Eichmann* overcame this predisposition.

63 *Ibid.*, at 155, § 122.

64 Although it was not a formal requirement to prove the elements of the doctrine, the District Court nevertheless emphasized Eichmann's centrality and breadth of operations throughout the Judgment. See the discussion in *supra* note 40.

65 *Eichmann* Judgment, at 234, § 194.

A third example of how victims' testimony was used in the *Eichmann* Judgment was the Court's account of the massacres in Eastern Europe perpetrated by the so-called 'Operation Groups' set up on the eve of Hitler's war against Russia, which had acted in the rear of the advancing German army and in co-ordination with it. The Court commenced its account with lengthy excerpts from a survivor, Avraham Aviel, on the mass murders of the Jews of his native village of Dowgaliszuk, near Radom in Poland:

> Germans arrived in battle uniform, equipped with automatic arms, dressed as if for the front … I went out … On the way, other Jews joined us, from all the houses they brought out more and more Jews … about a thousand … I walked with my mother … I was on her right, my brother on her left. That is how we walked … They brought us to the marketplace in the centre of the village and forced us to kneel with our heads down. It was forbidden to raise one's head. Anyone who did so received a bullet in the head or was beaten with truncheons … All we heard were shots coming from the side. Since I was small, I could raise my head a little without being seen. I then saw a long pit, about 25 metres or maybe 30 metres. They began leading line after line, group after group, of Jews towards the pit. They made them undress and when they came up on to the mound, bursts of shots were heard. And they would fall into the pit. I saw one case of a Jewish girl who struggled, she absolutely refused to undress. They hit her and shot her too. Children, women, whole families, each family went together.[66]

The challenges associated with finding reliable eyewitness testimony are encountered in this testimony, according to standard rules of criminal procedure, as the witness emphasized that he was not allowed to raise his head and look. Even with his brief glancing around, he could have only seen the pit in front and the victims at his sides. The witness could not have seen the soldiers shooting, let alone identify them in a criminal trial. This merely provided testimony of hearing — that is, the witness heard the shooting. Following this, the Court quoted the horrific testimony of Rivka Yosselevska, asked by the shooter to choose whom should be shot first, herself or her daughter.

> Then my turn came … I turned my head and he asked me: 'Whom do I shoot first, your daughter or you?' I did not answer. I felt them tearing my daughter away from me, I felt her last cry and heard how she was shot. He caught me by my hair and wanted to shoot me … I heard a shot but remained standing. He turned me around once again and began reloading his revolver. He turned me around and shot. I fell into the pit and felt nothing more.[67]

The Court immediately then turned to the defendant's viewpoint. This sharp move from the victim to the accused was captured by the shift from hearing to seeing: 'The Accused saw with his own eyes near Minsk a slaughter of [the kind described by Yosselevska] … at the pit edge, as he related in his Statement to the police.' Eichmann's statement was cited as if his words were a direct

66 *Ibid.*, at 151, § 120.
67 *Ibid.*, at 152, § 120.

continuation from the point in which Yosselevska's testimony stopped. However, the account was given from the viewpoint of the perpetrator:

> Young marksmen … were firing into the pit … I can still see a woman, her arms behind her, and then my knees gave way, and I left the place …
> Q. Was the pit full of corpses?
> A. The pit was full.[68]

Eichmann, the desk murderer, was not active in the killings perpetrated by these Operation Groups, he was not the actor, but presented himself as the spectator. This represented the moment in the Judgment at which the defendant confronted the human reality behind the documents and numbers forming his daily routine. These numbers were transformed into the physical reality of murder and Eichmann chose to leave. The Court added that 'on his way back, he saw blood spurting like a fountain out of another pit which had already been covered over'.[69] In a sense, even the accused was not an ideal eyewitness, since he saw this after the murders had taken place.

This integration of these victims' viewpoint, neither of whom saw the shooting, with that of the perpetrator, who chose to walk away and not look, illustrated the unbridgeable rift between victims and perpetrators that characterized the crimes of the Final Solution. The Court dryly deduced the defendant's *mens rea* from this incident: 'That was the fate which befell the Jews whom he sent to the Operation Groups commanded by Nebe and Rasche, knowing full well that their end would be death at their hands.'[70] The Court

68 *Ibid.*

69 *Ibid.* The Court's choice of words was not incidental; these words echoed those used by the witness Yosselevska, who described how she had returned to the grave after a while in a passage not included in the Judgment: 'I dragged myself over to the grave and wanted to jump in. I thought the grave would open up and let me fall inside alive. I envied everyone for whom it was already over, while I was still alive. Where should I go? What should I do? Blood was spouting. Nowadays, *when I pass a water fountain I can still see the blood spouting from the grave*' *Eichmann* Proceedings, 442, Vol. I (Session 30) (emphasis added).

70 The trips made by Eichmann to the murder sites were used by the Court to examine Eichmann's contribution through supervision on the ground. For instance, the Court referred to Eichmann's visits to camps and concluded: 'The question whether the accused also participated in what was happening inside the camps is complicated because of his admissions that he used occasionally to visit Golbocnik, and that he also saw the Treblinka Camp under construction in the autumn of 1941 … and again later when it was functioning. He describes the purpose of his visits to the East as being purely to collect information for Heydrich and Mueller who were interested in Globocnik's activities. It is difficult for us to believe that they would send the accused on such a journey merely for that purpose, but in the absence of other evidence we are unable to draw further conclusions from this fact by itself.' See *Eichmann* Judgment, at 181, § 142. In recent ICTY jurisprudence concerning leadership cases involving a vast criminal enterprise, the defendants' contribution was examined in a similar manner. Thus, e.g. in the *Krajišnik* case, the ICTY considered the defendant's 'journeys through the contended territories as well as his frequent meetings with the various municipal authorities to discuss the strategic situation and cooperation in logistical matters … to be indicative of his overall participation and contribution to the enactment of the joined endeavor'. See G. Bigi, 'Joint Criminal Enterprise in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the Prosecution of Senior Political and Military Leaders: The *Krajišnik*

left it to the reader to deduce the historical and moral conclusions. While, once again, Eichmann's statement placing him near the murder pit as the *Einsatzgruppen* operated may have been sufficient, this juxtaposition with the victim's account increased the severity of the defendant's *mens rea*.[71]

Thus, in its Judgment, the Israeli District Court undertook a dual legal role: proving the crime according to ordinary evidentiary standards, and at the same time, providing a reflexive perspective on the limits of the criminal law to properly grasp these crimes. Merely adhering to ordinary criminal procedure would have made the Court complicit in the silencing of victims by the Nazis.[72]

This position held by the Court on the relevance of testimony given by victims sheds light on the protected social value it attached to crimes against humanity and genocide. While Arendt conceptualized this as relating to human plurality, the Court strove to protect the humanity of the individual as the core value of the legal prohibition. This jurisprudence reaffirmed the humanity of the victim, not merely by bringing to justice the perpetrator, but by making the testimony of his victims an integral part of the trial.

B. Joint Criminal Enterprise as a New Basis for Victims' Testimony?

I have examined the legal functions given by the Court in *Eichmann* to testimony of survivors of the Final Solution: exposing the human reality behind the numbers, the gap between victim and perpetrator, and the diffuse character of participation in the crime as well as establishing *mens rea*. I will now address the use made by the Court of victims' testimony in connection with the doctrine of JCE. In this analysis, the *Eichmann* Judgment provides the precursor to similar use of victims' testimony by international criminal tribunals in order to prove collective crimes.

Interim Decision No. 13 is significant in the *Eichmann* trial. This decision was handed down in response to the objection made by Dr. Servatius, the defendant's counsel, to the relevance of the witness, Dr. Wells. It was argued that Eichmann's partial admission of the facts, although denying his culpability, rendered testimony by this witness irrelevant to establish guilt. Dr. Wells was the sole survivor of a family of 76 individuals from Lvov. He testified at length on his own personal story — including his incarceration at the Janowska

Case', 14 *Max Planck Yearbook of United Nations Law* (2010) 51, at 81, 76; referring to Judgment, *Krajišnik* (IT-00-39-T), Trial Chamber, 27 September 2006, §§ 987–1005.

71 One of the problems of system criminality, as explained by Arendt and Bauman, is not merely the physical distance between the perpetrator and the crime, but more importantly, the dissociating effect that such distance creates in the perpetrators' psychological constitution. See van der Wilt, *supra* note 23, at 166–168. By juxtaposing the victims' and Eichmann's testimony regarding similar events, the *Eichmann* Judgment highlighted Eichmann's attempts at dissociation, thereby increasing his guilt.

72 For a critique of the refusal by courts in Germany to address the limitations of criminal procedure, which made victims' testimony irrelevant and questioned the victim's reliability, see Ida Fink's short story in her collection on Jewish lives. I. Fink, 'The Table', in *A Scrap of Time and Other Stories* (Northwestern University Press, 1995).

concentration camp, his escape and subsequent hiding, and his work in the so-called 'Death Brigades'. At the same time, he told the story of the Jews within his surroundings, also recounting events in which he did not directly participate. Landau ruled that the defendant's partial admission was insufficient and that the prosecution was still required to prove that the acts were perpetrated. For this purpose, the testimony was legally relevant: 'We think that the evidence of the witness Wells is relevant to the subject of the trial. The question that has to be determined is the personal responsibility of the Accused for the acts set out in the indictment. In this connection the Prosecution has firstly to prove that all these acts were committed and secondly — the responsibility of the Accused.'[73]

While, at that time, Arendt and others from the international community condemned this decision, this approach later gained approval by international tribunals. Thus, the Rome Statute specifies that the defendant cannot, through a plea bargain, prevent the determination of truth since establishing the truth is an independent goal of the trial.[74] Since the 1990s, international criminal tribunals have considered that their role includes the establishment of historic truth beyond the proof of individual guilt and accepted, for this purpose, testimony by irrelevant witnesses.[75]

Given this expanded function of international criminal bodies in determining the historical truth, how should the role of victims be conceptualized? According to Richard Wilson, the early trials of the ICTY and ICTR in the 1990s should be distinguished, as the defendants were hierarchically low ranking, from later trials, in which the tribunals began adjudicating the actions and liability of higher ranking officials and political or military leaders.

73 Interim Decision No. 13, *Eichmann* Proceedings, 314, Vol. I (Session 23). See also *Eichmann* Judgment, at 150, § 119, which held: 'The witnesses who gave evidence about this part were hardly questioned at all by Counsel for the Defense, and at a certain stage in the proceedings he even requested that the Court therefore waive the hearing of these witnesses. To this we could not agree because, since the Accused denied all the counts in the indictment, we had to hear also the evidence on the factual background of the Accused's responsibility, and could not break up the indictment according to a partial admission of facts by the Accused.'

74 Determination of truth is a concept embedded in various parts of the ICCSt., see Arts 54(1)(a), 65(4) and 69(3). See also G.S. Gordon, 'Toward an International Criminal Procedure: Due Process Aspirations and Limitations', 45 *Columbia Journal for Transnational Law* (2007) 635, at 697; Cf. Art. 65, ICCSt., cited in C. Safferling, 'The Role of the Victim in the Criminal Process — A Paradigm Shift in National German and International Law?' 11 *International Criminal Law Review* (2011) 183, at 213. For an articulation of the relation between truth finding and plea agreements at the ICTY see Sentencing Judgment, *Nikolić* (IT-94-2-S), Trial Chamber, 18 December 2003, §§ 120–122, which states: 'a plea agreement … does not allow the Trial Chamber to depart from the mandate of this Tribunal, which is to bring the truth to light and justice to the people of the former Yugoslavia'. The ICTYSt., ICTRSt. and the ICCSt. are examples of a recent transformation of the concept of truth into a human right in and of itself. See e.g. United Nations Human Rights Council, *Right to Truth: Report of the High Commissioner for Human Rights*, UN Doc. A/HRC/12/19, 21 August 2009.

75 E.g. in *Krstić*, the ICTY stated that its task was to establish what happened in the relevant period before deciding on the criminal responsibility of the defendant. See M.-B. Dembour and E. Haslam, 'Silencing Hearing? Victim-Witnesses at War Crimes Trials', 15 *European Journal of International Law* (2004) 151, at 167.

Wilson argues that international tribunals opened their doors to victims as witnesses mainly in trials of lower ranking executors in the hierarchy, those who had direct contact with the victims.[76] As the trials rose through the commanding hierarchy, so did the importance of perpetrators' documents as central evidence,[77] along with the testimony of historians as expert witnesses to explain the context in which the documents should be read.[78]

The *Eichmann* Judgment took a different approach. Even though it addressed the liability of a high-ranking bureaucrat, the Judgment remained anchored to testimony given by victims. Recent historical scholarship sheds new light on this approach, connecting it to the historiographical debate that began in the Jewish Displaced Persons (DP) camps in Germany after the war. In these DP camps, two visions of how history should be written competed: the approach of historians as expert witnesses — history was the domain of historians; and the community approach — history belonged to the community of victims and each survivor was an agent of collective memory. The community approach won in the camps and later made its impression on the prosecution in *Eichmann*.[79] Under this perception, the survivors were not mere witnesses — they gave testimony as historians. A proponent of this approach, Rachel Auerbach, who was a Holocaust survivor and the lead researcher at the Yad Vashem institute, convinced Hausner to narrate the story of the Holocaust through the testimony of over 100 survivors.[80]

The origins of the Court's approach can be traced to the particularly Jewish experience in DP camps. Yet, beyond the didactic role of the trial in establishing the historical truth stands a different legal rationale for the use of testimony of survivors in relation to collective crimes characterized by systematic patterns of violence.

C. 'Common Plan' and Patterns of Systematic Criminality

The common plan doctrine is based on identifying a pattern, or a recurring method, which enables the linking of superiors and their liability to acts

76 But see *ibid.*, at 168. Marie-Bénédicte Dembour and Emily Haslam argue that even if the historical context is important, it can be inferred from documents and not through victim-witnesses as was done in the *Krstić* case, in a manner similar to the *Eichmann* trial.

77 R.A. Wilson, *Writing History in International Criminal Trials* (Cambridge University Press, 2010), at 122.

78 *Ibid.*, at 122–123.

79 A. Schein, '"Everyone Can Hold a Pen": The Documentation Project in the DP Camps in Germany', in D. Bankier and D. Mikhman (eds), *Holocaust Historiography in Context: Emergence, Challenges, Polemics and Achievements* (Berghahn Books, 2008) 103; L. Jockusch, 'Historiography in Transit: Survivor Historians and the Writing of History in the Late 1940s', *Leo Baeck Institute Year Book*, Advance Access, 28 March 2013, at 5–6.

80 D.E. Lipstadt, *The Eichmann Trial* (Nextbook/Schocken, 2011), at 52. Auerbach testified in the *Eichmann* trial along with two other witnesses who were active in the historical commission in Poland, Leon Weliczker (Wells) and Ada Lichtman, a founding member of the Jewish Historical Commission in Lublin. See Jockusch, *supra* note 79, at 16; Douglas, *supra* note 44, at 97–182.

committed over a vast geographical area by many individuals. Thus, in the *Eichmann* trial several statements by the Court indicated that whereas Eichmann was in charge of deportation to a certain camp, the method of deportation, killing, and so forth was common to various locations. Therefore, the Court relied on survivors' testimony from places where similar acts had been committed to describe the results of Eichmann's actions. Identifying such a pattern was evidence of joint action and allowed the Court to rely on testimony given by survivors from places that were not directly under Eichmann's responsibility.[81] The Judgment's section entitled 'Living Conditions in the Camps' contains an example of this approach:

> We have heard evidence about the reign of terror in Auschwitz in the shadow of the smoke belching from the crematoria, and in the many camps connected with Auschwitz. There was substantially similar evidence about conditions in the Majdanek Camp in the East and in the many Labour and Concentration Camps scattered throughout Eastern Europe. The system was uniform, with local variations according to the sadistic inventiveness of the Commanders and of the guards to whom the lives of the Jews were abandoned. We shall quote witnesses on this subject too, who experienced this system in their own persons. Here also the passages chosen at random from the vast amount of evidence brought before us will suffice to illustrate that the aim of the whole system was to exterminate the Jew by making him work under inhuman conditions until the last ounce of strength had been squeezed out of him.[82]

There was a similar reliance on victims in a recent ICTY judgment involving politicians and high level military officials. The ICTY deduced the existence of a plan from the testimony given by victims showing a pattern of activities. The allegations in *Milutinović et al.*[83] involved crimes perpetrated against Kosovo Albanians with the aim of changing the ethnic balance in Kosovo. The prosecution claimed a large scale and systematic enterprise and the indictment included mainly crimes against humanity, such as deportation, forcible transfer and other inhumane acts, murder and persecution. At the time of events, the accused were the highest ranking officials, including the President of the Republic of Serbia — who was acquitted, the Deputy Prime Minister of the Federal Republic of Yugoslavia (FRY), and the Chief of the General Staff of the Yugoslav Army. This lengthy trial lasted more than two years, during which the Chamber heard oral testimony from a total of 235 witnesses.[84] One of the main tasks of the Chamber was to establish the facts of the deportation of Kosovo Albanians from 13 municipalities across Kosovo, especially during

81 The ICTY tried to limit the application of JCE liability by requiring joint action, that is, concerted and coordinated activities between the members of the common enterprise. For further discussion see Bigi, *supra* note 70, at 81.

82 *Eichmann* Judgment, at 162, § 129.

83 Judgment, *Milutinović et al.* (IT-05-87), Trial Chamber, 26 February 2009 (hereinafter '*Milutinović* Judgment'). This case was renamed *Šainović et al.* on appeal due to the acquittal of Milutinović.

84 See Judgment Summary for *Milutinović et al.*, 26 February 2009 (unnumbered pages), available online at http://www.icty.org/x/cases/milutinovic/tjug/en/090226summary.pdf (visited 28 February 2013).

the relatively short period of the NATO aerial bombardment between 24 March and 10 June 1999. According to documentary evidence, during the period between 24 March and 1 May 1999, a total of 715,158 Kosovo Albanians crossed into Albania or Macedonia.[85] The prosecution claimed that this movement was the result of 'the violent and coercive actions of the forces of the FRY and Serbia, which engaged in a campaign of terror and violence against the Kosovo Albanian population in order to expel them from their homes and force them across the borders'.[86] In its Judgment, the Trial Chamber systematically examined the events in each of these 13 municipalities based on testimony given by victims.[87] Following this examination, the Trial Chamber turned to 'the overall pattern of events',[88] holding that:

> [T]here was a broad campaign of violence directed against the Kosovo Albanian civilian population during the course of the NATO air-strikes, conducted by forces under the control of the FRY and Serbian authorities. The witnesses who testified both about their own experiences and that of their families, friends, and neighbours, in the few weeks between 24 March and the beginning of June 1999, gave a broadly consistent account of the fear that reigned in towns and villages across Kosovo, not because of the NATO bombing, but rather because of the actions of the VJ and MUP forces that accompanied it. In all of the 13 municipalities the Chamber has found that forces of the FRY and Serbia deliberately expelled Kosovo Albanians from their homes, either by ordering them to leave, or by creating an atmosphere of terror in order to effect their departure. As these people left their homes and moved either within Kosovo or towards and across its borders, many of them continued to be threatened, robbed, mistreated, and otherwise abused. In many places men were separated from women and children, their vehicles were stolen or destroyed, their houses were deliberately set on fire, money was extorted from them, and they were forced to relinquish their personal identity documents.[89]

In response to the claims by the defence that these people fled their homes due to other reasons, such as the NATO bombing, the Chamber found:

> The Kosovo Albanian witnesses, who testified about their own expulsion and that of many others from Kosovo, came from a broad cross-section of that community, generally with no connection to one another beyond their victimisation, and it is inconceivable that they could or would all have concocted such detailed and consistent accounts of the events that they experienced and witnessed.[90]

This case, although not necessarily representative, demonstrates that to prove the occurrence of a collective crime, perpetrated against a vast number of people, courts may turn to the victims and their account of the events to

85 *Milutinović* Judgment, § 1150.
86 *Ibid.*, § 1151.
87 *Ibid.*, §§ 1–1149.
88 *Ibid.*, §§ 1150–1178.
89 *Ibid.*, § 1156.
90 *Ibid.*, § 1175.

establish the systemic nature of the acts and their aggregation into one whole.[91]

With this in mind, the originality of the *Eichmann* trial can be understood. There too, the prosecution encountered difficulties emanating from Eichmann's rank in the Nazi hierarchy and from his distance from the actual crimes. Much like the ICTY in this case, the Israeli prosecution's solution was not to rely on an historian as an expert witness but on the testimonies of victims alongside documents to prove the systematic nature of the Final Solution and the defendant's role within it.[92] I am not suggesting the wholesale adoption of survivor testimonies in leadership trials, as scholars have pointed to substantive problems associated with this form of testimony.[93] Rather, I argue that the outright rejection of victims' testimony carries important costs, as it deprives the trial of discussion of those aspects of collective crimes, in particular dehumanization, which cannot be captured by documents or historical expertise.[94]

91 However, Dembour and Haslam came to a contrary evaluation of the reliance on victims by the Trial Chamber at the ICTY in the *Krstić* case, which revolved around the massacre in Srebrenica. See Dembour and Haslam, *supra* note 75, at 168–169. The authors caution against the political uses of victims, as was done in the *Eichmann* trial. It seems that just as such a critique misses the legal rationale behind the use made by the Court in *Eichmann* of victim testimonies, so it misses a similar rationale underpinning the jurisprudence of the ICTY — in both cases the testimonies of victims were used to establish a pattern of systemic atrocity in trials of superiors.

92 An expert historian, Salo Baron, was invited to give testimony at the *Eichmann* trial. However, his testimony focused on describing the Jewish communities in Europe in the years preceding the Nazi rise to power in order to explain the cultural devastation caused by the Nazis, what may be termed today as 'cultural genocide'. On the widespread criticism voiced against this testimony see H. Yablonka, *The State of Israel v. Adolf Eichmann* (Schocken Books, 2004), at 100–106.

93 P.M. Wald, 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal', 5 *Yale Human Rights & Development Law Journal* (2002) 217; P.M. Wald, 'To Establish Incredible Events by Credible Evidence: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings', 42 *Harvard International Law Journal* (2001) 535. On the ICTR see J. Pozen, 'Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTR Trials', 38 *New York University Journal of International Law and Politics* (2005–2006) 281.

94 Nancy Combs analysed the use of eyewitness testimonies during international criminal trials. Her research shows that many impediments, among them unreliable witnesses, prevent such trials from reliable fact-finding. She finds that instead of solely relying on testimony given by an eyewitness, tribunals tend to supplement it with evidence of organizational liability, mainly in the form of JCE, without admitting to doing this. This forms part of her recommendation for handling trials in the future. It is thus a procedural problem regarding witnesses that leads Combs to recommend adopting a framework of organizational liability. See generally Combs, *supra* note 6, in particular, at Chapters 8, 9. In contrast, as I show here, the Court in *Eichmann* reached the same connection between testimony and collective liability, from the opposite direction, that is, by defining the crimes as collective in nature. This understanding of the nature of collective crimes, which is missing from Combs' approach, confers an additional role to eyewitnesses of mass atrocities, not only for proving a pattern of criminality, but also for understanding the value protected by these crimes.

4. Historiographical Implications: An Integrated History of the Holocaust?

If it is accepted that the integration of victims' testimony into the *Eichmann* trial served the legal purpose of determining Eichmann's guilt for collective crimes, the combination of documents of the perpetrators with testimony by victims also carries significant historiographical implications. This article will now explore an alternative and complementary motivation for the District Court's approach, specific to internal developments in the communities of Jewish survivors in the DP camps and, later on, in Israel. As has been seen, research has shown that Hausner's decision to rely heavily on the testimony of Jewish victims reflected a community approach to the historical narrative of the Holocaust.

It is important to distinguish between the positions of Hausner and Landau on this testimony. Landau concurred with Hausner on its legal relevance. He objected, however, to the attempt to subordinate the story unfolding in these testimonies to the dictates of the Zionist narrative celebrating the heroism of Jewish resistance fighters and partisans. Landau's position can be gleaned from his decision to reprimand the prosecutor precisely over the testimony of the individual who was regarded as *the* symbol of heroism — Abba Kovner.[95]

What is the historic counter narrative that the *Eichmann* Judgment provided by weaving together Nazi documents with testimony given by the survivors? It is necessary to return to the concept of an integrated history, briefly mentioned earlier. Renowned Holocaust historian, Saul Friedländer, provides a methodological explanation of his chosen sources. Friedländer seeks to bridge a gap that became increasingly institutionalized between general historians and Jewish historians. The growth of this gap corresponded with the use of sources, dividing the research of historians based solely on perpetrators' documents, such as Raul Hilberg, with that based on victims' testimony and diaries. Friedländer, unlike previous historians of the Third Reich, introduces, what he termed, an 'integrated history', weaving together the perspectives of the perpetrators, the attitudes of surrounding societies and experiences of Jews. For Friedländer, the anti-Jewish policies initiated from the top could not be

95 At the end of the lengthy testimony given by Abba Kovner, Judge Landau stated: 'Mr. Hausner, we have heard shocking things here, in the language of a poet, but I maintain that in many parts of this evidence we have strayed far from the subject of this trial. There is no possibility at all of interrupting evidence such as this, while it is being rendered, out of respect for the witness and out of respect for the matters he is relating. It is your task to prepare the witness, to explain matters to him, and to eliminate everything that is not relevant to the trial, so as not to place the Court once again — and this is not the first time — in such a situation. I regret that I have to make these remarks, after the conclusion of evidence such as this.' See *Eichmann* Proceedings, 398, Vol. I (Session 27).

understood without the words of the victims on the ground.[96] In the introduction to the second volume Friedländer writes:

> By its very nature, by dint of its humanness and freedom, an individual voice suddenly arising in the course of an ordinary historical narrative of events such as those presented here can tear through seamless interpretation and pierce the (mostly involuntary) smugness of scholarly detachment and 'objectivity'. Such a disruptive function would hardly be necessary in a history of the price of wheat on the eve of the French Revolution, but it is essential to the historical representation of mass extermination and other sequences of mass suffering that 'business as usual historiography' necessarily domesticates and 'flattens'.[97]

Victims' voices should not be understood as an example of statistical data or simply as history written from the victims' point of view. Rather, by integrating their voices into the general narrative, Friedländer wishes to preserve the element of disbelief and misunderstanding of the crimes.[98]

An analogous approach was taken by the *Eichmann* Judgment, although it stemmed from legal reasons. The Court commenced its historical narrative with reference to two testimonies: K-Zetnik, pseudonym of the author Yehiel Dinur, and Moshe Beiski. The Court selected these testimonies as the framework to guide readers throughout the survivors' testimony included in the judgment. At first glance, these testimonies could not have appeared more different. K-Zetnik, a survivor of Auschwitz and one of the most famous witnesses during the *Eichmann* trial, had collapsed on the stand during his failed attempt to bridge the abyss separating 'here' and 'there'.[99] As Shoshana Felman argues, K-Zetnik's inability to resume his testimony made it a symbol of the limits of legal judgment on the Holocaust. It is through this failure that the testimony created a reflexive awareness of the confines displayed by conventional rules on legal testimony to apply to the Holocaust.[100] In contrast, the testimony of

96 S. Friedländer, *Nazi Germany and the Jews: The Years of Persecution, 1933-1939*, Vol. 1 (HarperCollins, 1997), at 1–2; S. Friedländer, *Nazi Germany and the Jews: The Years of Extermination, 1939-1945*, Vol. 2 (HarperCollins, 2007), at xv. Laura Jockusch argues that the historical commissions created by Jewish survivors after the war were the first to introduce this unique integration of Nazi sources with Jewish sources. See Jockusch, *supra* note 79, at footnote 67 and accompanying text.

97 Friedländer, Vol. 2, *ibid.*, at xxv–xxvi. For a critical assessment of the project see A. Goldberg, 'The Holocaust and History: Cut-offs in a Postmodern Era', *Theory & Criticism* (2012) 121.

98 Friedländer, Vol. 2, *supra* note 96, at xxvi. Interestingly, throughout the book, the term 'disbelief' is used to describe reactions (sometimes in their own words) of various witnesses to the events: e.g. a soldier who watched executions of Jewish persons, not out of curiosity but out of 'disbelief that something of this type could happen', *ibid.*, at 218, the Jewish victims, *ibid.*, at 438, a Swedish intelligence agent, *ibid.*, at 459, or the inhabitants of Kiev who 'had expressed disbelief and then horror when faced with the Babi Yar massacres', *ibid.*, at 537.

99 Footage of the testimony given by witness K-Zetnik is available online at http://www.youtube.com/watch?v=4PvJWXPFgfI (visited 28 November 2013). An English translation of the transcript is available online at http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-068-01.html (visited 28 November 2013).

100 S. Felman, 'A Ghost in the House of Justice: Death and the Language of the Law', in S. Felman (ed.), *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Harvard University Press, 2002) 131, at 156.

Beiski — a magistrate and, later on, a justice of the Supreme Court — was analytical and rationalist. This appearance cracked when Hausner posed a cruel question in conformity with Israeli perceptions at that time, relating to an incident in which Beiski and thousands of Jewish prisoners were forced to watch the hanging of a young boy: '15,000 people stood there — and opposite them hundreds of guards. Why didn't you attack them, why didn't you revolt?' In response, the witness requested, for the first time, permission to be seated. His subsequent explanation was quoted in full in the Judgment:

> It is no longer possible even for us — and I admit this — to describe the feeling of terror 18 years later. As I stand before Your Honours, it no longer exists and I do not think it is possible to impart that feeling to anyone … . The conditions existing at the time cannot be conveyed today to the courtroom, not that I think, God forbid, that someone may not understand this, but even I myself cannot do so and I felt it on my own flesh.[101]

The decision of the Court to frame all testimony given throughout the course of the trial within these two legal low points — the collapse of a witness and the interruption of fluent testimony by another witness who then stumbled for words — provides a framework for readers to approach the Judgment's historical narrative. Despite the analytical and rational order the Judgment wished to impose on the historical narrative of the Holocaust, this framework or disclaimer, which opened the narrative, was designed to preserve the shock of disbelief, as emphasized by Friedländer. Akin to the historian's methodology, the Judgment sought to provide an integrated history by: first, combining the viewpoints of the perpetrator and the victim — bringing together testimonies and documents; and second, preserving the unbridgeable gap between the worlds of the victimizer and victim — the trace of which was found in the witness' collapse on the stand.

Quoting Beiski, the Judgment stated that survivors as witnesses 'spoke simply, and the seal of truth was on their words. But there is no doubt that even they themselves could not find the words to describe their suffering in all its depth'. It was concluded:

> If such be the sufferings of the individual, then the sum total of the suffering of the millions — about a third of the Jewish people, tortured and slaughtered — is certainly beyond human understanding, and we are inadequate to give it expression. This is a task for the greatest writers and poets. Perhaps it is symbolic that even the author, who himself went through the hell named Auschwitz, could not stand the ordeal in the witness box and collapsed.[102]

As explained by Friedländer, the interjection of the victims' viewpoints into the historical narrative is not simply demonstrative, but a device for preserving disbelief. Landau implicitly and subtly challenged the didactic agenda of the prosecution to bestow an omnipotent role to the law. In contrast, the Judgment strove to keep at bay the adoption of a uniform explanation, by listening to survivors' hesitations and understanding that the poet and historian may well be

101 *Eichmann* Judgment, at 150, § 119.
102 *Ibid.*, at 150, § 119.

better equipped for this endeavour than the judge. In this sense, the legal and historical approaches adopted by the Court were similar: reflexivity was introduced in both, thereby challenging commonly held confidence in the epistemic tools available to discuss the Holocaust. This transformation of the concept of eyewitness testimony to do justice to the crimes of the Final Solution formed part of this undertaking.

Regarding the historical narrative that emerged from the trial, this decision to begin the Judgment by referencing the testimony of K-Zetnik and Beiski, recalls that the seemingly rational structure of the narrative, progressing chronologically and geographically and providing a comprehensive view integrating the perspective of the Nazi perpetrators and Jewish victims, may in fact be misleading. This is merely an approximation, a legal representation, by necessity concealing the gap of incomprehensibility that separates us from the reality of the crimes recounted in the Judgment.

There is arguably an intrinsic tension in the attempt to provide an integrated history combining the viewpoints of perpetrator and victim. How should the need to provide a comprehensive historical narrative that bridges the viewpoints of perpetrator and victim be reconciled, without falsifying the historical reality in which such a meeting of viewpoints was impossible? How should disbelief be retained in a narrative that attempts to determine guilt beyond reasonable doubt? How can legal theories attuned to the new mode of bureaucratic participation be constructed without falling into collective guilt? I cannot fully answer these questions, however, I suggest that both Landau and Friedländer were deeply aware of the problem and struggled to find adequate ways to respond to it. It is striking that notwithstanding the 40 years separating them and the different vocation of judge and historian, both developed similar methodologies to narrate the story of the crimes committed against the Jews. I draw attention to these questions as requiring consideration by those promoting didactic goals for atrocity trials.

5. Conclusion

In *Basic Concepts of Criminal Law*, George Fletcher describes the judicial development of the law: 'Courts proceed by identifying a core image of crime and punishing it. That precedent, then, becomes the paradigm for the offense.'[103] This article has uncovered the legal mission of the District Court in *Eichmann*: to depict a core image of a relatively new type of criminality — crimes against humanity — by changing the paradigm offered in Nuremberg to one that renders the testimony of victims relevant to establishing guilt and integrating them into the trial. The Court achieved this paradigm shift with a three-fold analysis: first, interpreting the new crimes of genocide and crimes against humanity; second, developing a theory regarding modes of liability in collective crimes; and finally, elaborating the role of victims' testimony in atrocity trials,

103 G.P. Fletcher, *Basic Concepts of Criminal Law* (Oxford University Press, 1998), at 78.

expanding its relevance while constraining its didactic uses. When combined together, these three lines of reasoning provided a novel jurisprudence of atrocity trials — one that regarded the victims' humanity as the core value protected by these prohibitions.

The *Eichmann* trial has long suffered a poor press. To counteract this, this article identified its potential contribution to international criminal law — the development of a new jurisprudence of atrocity trials that confers legal recognition and importance to the testimony of the individual victim during the trial of the perpetrator.